

DISTRICT OF MAINE

Docket No. 01-277-P-H

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filed against them by the Shapland defendants; grant the motion for summary judgment filed by the Shapland defendants; grant the motion to dismiss filed by the Nagel defendants; and deny the motion to dismiss filed by the Howe defendants.

I. Applicable Legal Standards

The motion to dismiss filed by the Nagel defendants invokes Fed. R. Civ. P. 12(b)(6), as do the two motions to dismiss filed by the Howe defendants. Defendants Ira Nagel and Greenbaum, Nagel, Fisher and Hamelburg's Motion to Dismiss, etc. ("Nagel Motion") (Docket No. 17) at 1; Motion of the Defendants Stephen Howe and Dane & Howe that the Complaint be Dismissed as to Them Under Rule 12(b)(6) ("Howe Dismissal Motion") (Docket No. 8) at 1; Motion of Stephen Howe to Dismiss the Crossclaim of Peter Shapland and Peabody and Arnold, LLP Under Rule 12(b)(6) ("Howe Crossclaim Motion") (Docket No. 27) at 1. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

The Shapland defendants have filed a motion for summary judgment. Motion for Summary Judgment of Defendants Peter Shapland and Peabody & Arnold LLP ("Shapland Judgment Motion") (Docket No. 14). Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the

nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The amended complaint includes the following relevant factual allegations.

The named plaintiffs at the time the amended complaint in this action was filed were Joan Siegemund, Joan Siegemund on behalf of the estate of Rose Winston and the estate of Rose Winston. Amended Complaint (Docket No. 7) at 1. There is no indication that Joan Siegemund was ever appointed as the personal representative of that estate. Rose Winston, the mother of the present plaintiff’s decedent, died while residing in Machias, Maine, in 1993. *Id.* ¶ 1. Rose Winston’s estate is currently pending in Washington County Probate Court. *Id.* ¶ 2. Defendant Peter Shapland, an attorney with the defendant law firm of Peabody & Arnold, LLP, was appointed personal

representative of the estate of Rose Winston in the Maine probate proceeding and in ancillary probate proceedings in Boston, Massachusetts. *Id.* ¶¶ 3, 55. Defendant Stephen Howe is an attorney with the defendant law firm of Dane & Howe in Boston, Massachusetts. *Id.* ¶ 4. Defendant Ira Nagel is an attorney with the defendant law firm of Greenbaum, Nagel, Fisher and Hamelburg in Boston. *Id.* ¶ 5.

In 1987, Dr. Rose Winston, who was born on August 17, 1904, was a resident of Boston and owned real estate there. *Id.* ¶ 7. Beginning on September 3, 1987 Dr. Winston was hospitalized for four weeks. *Id.* ¶ 8. Her daughters, Joan Siegemund and Diane Crocker, and attorney John Thornton were appointed as temporary guardians of Dr. Winston. *Id.* ¶¶ 1, 10. In November 1987 the Suffolk County Probate Court in Massachusetts appointed Nagel as guardian of Dr. Winston's person, over Siegemund's objection. *Id.* ¶ 11. Nagel retained Medical Personnel Pool to provide 24-hour care for Dr. Winston; that care was incompetent and inadequate. *Id.* ¶ 14. The nursing staff prevented Siegemund from communicating with her mother. *Id.* ¶ 16. Defendant Howe was appointed as guardian of the property of Dr. Winston, which was valued at over \$4,000,000 at the time of his appointment in 1987. *Id.* ¶ 17.

Dr. Winston became ambulatory and her health otherwise improved by early 1989. *Id.* ¶ 20. At this time Siegemund offered to care for her mother herself in California where Siegemund resided and also provided Nagel with the names of several assisted living facilities that she felt would be appropriate for her mother. *Id.* ¶ 21. Howe introduced Audrey Pitman, the daughter of a client of his, to Dr. Winston and in December 1989 Nagel hired her to care for Dr. Winston, dismissing Medical Personnel Pool. *Id.* Pitman had no medical training or certification and limited experience in elder care. *Id.* ¶¶ 21-22. She was Dr. Winston's only caregiver. *Id.* ¶ 22. Dr. Winston was moved to Machias, Maine, where Pitman was building a house, in May 1990 at the direction of Howe. *Id.* ¶ 23.

Dr. Winston was moved to Resthaven Nursing Home for a time in the fall of 1990, where she received inadequate care. *Id.* ¶¶ 28-30.

On or about February 19, 1993 Dr. Winston suffered a stroke. *Id.* ¶ 34. She was taken to the hospital on February 23, 1993 after receiving inadequate care from Pitman. *Id.* ¶¶ 35-36. She was released from the hospital and rehospitalized the next day, then released again on March 5, 1993. *Id.* ¶¶ 36-38. Dr. Winston died at the Down East Community Hospital on March 18, 1993. *Id.* ¶ 41. Howe authorized cremation of Dr. Winston’s body. *Id.* ¶ 42. At all relevant times, Dr. Winston had “medicare and supplemental medical care coverage for in-hospital treatment and home treatment by skilled nurses.” *Id.* ¶ 46.

Shortly after becoming guardian of Dr. Winston’s property in 1988, Howe took steps to sell income-producing property located at 47-53 Hereford Street in Boston for \$2.2 million. *Id.* ¶ 48. When that sale did not go forward, he entered into a lease-purchase arrangement with Charles Patsos, who was not financially viable. *Id.* The lease-purchase arrangement required monthly lease payments of approximately \$8,300; Howe collected only the first three months’ payments, leading to a loss to the estate of \$330,000. *Id.* ¶ 49. Patsos partially destroyed the property, which was finally sold at auction for \$900,000. *Id.* Howe oversaw the improper eviction of two tenants from this property, which resulted in the filing of lawsuits against Dr. Winston, which were settled for over \$20,000. *Id.* ¶ 50. The total loss for this property exceeds \$2,000,000. *Id.* ¶ 53. Howe also caused other properties to be sold for less than market value. *Id.* ¶ 54.

Shapland, Howe and Nagel “agreed to wrongfully preclude [Siegemund] from being able to assert claims against them.” *Id.* ¶ 57. Shapland failed to object properly to the accountings of Howe and Nagel and failed to pursue other legal remedies for wrongs committed against Dr. Winston. *Id.* ¶ 56. He prevented Siegemund from obtaining necessary information about the guardianship of her

mother and her mother's property. *Id.* ¶ 58. He initially objected to the guardians' final accountings "on many of the grounds previously enumerated in this pleading" but "eventually capitulated on virtually all objections" after incurring significant legal expenses. *Id.* ¶¶ 59-60. Siegemund demanded that claims of breach of duty be pursued against Howe and Nagel and their law firms by Shapland and his law firm but Shapland stated that "I promised certain people I would not go after them." *Id.* ¶¶ 67-68.

Shapland provides the following relevant undisputed facts in connection with his motion for summary judgment. Siegemund was the daughter and heir of Dr. Winston. Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, etc. ("Shapland SMF") (Docket No. 15) ¶ 2; Plaintiffs' Statement of Facts in Dispute ("Plaintiffs' Responsive SMF") (Docket No. 30) ¶ 2. On May 7, 1993 Shapland was appointed by the Washington County Probate Court to be the personal representative of the estate of Dr. Winston. *Id.* ¶ 3. In his capacity as personal representative Shapland refused to bring suit against Nagel and/or Howe on any of the claims asserted against them in the instant action. *Id.* ¶ 4. Until she amended her complaint in the instant action in February 2002 Siegemund had never commenced an action against Nagel or Howe. *Id.* ¶ 5. Siegemund never sought the removal of Shapland as personal representative of her mother's estate. *Id.* ¶ 6.

III. Discussion

A. Motions to Strike

1. Docket No. 35. The Shapland defendants have filed a motion to strike the additional statement of facts filed by the plaintiff in response to their motion for summary judgment and all of the documents attached by the plaintiff to her memorandum of law in opposition to the motion for summary judgment. Defendants' Motion to Strike Materials Submitted by Plaintiffs in Opposition to Defendants' Motion for Summary Judgment (Docket No. 35). The plaintiffs included in their response to the statement of

material facts filed by the Shapland defendants in support of their motion for summary judgment an “Additional Statement of Facts” presenting three numbered paragraphs, all citing to the affidavit of Calvin True, an expert witness retained by the plaintiffs. Plaintiffs’ Responsive SMF ¶¶ 7-9. The Shapland defendants contend that all of these paragraphs are statements of opinion rather than fact and must therefore be stricken and that statements of opinion regarding a legal question are not appropriate in any event. Memorandum of Law in Support of Defendants’ Motion to Strike (“Shapland Motion to Strike”) (filed with Docket No. 35) at 3.

The third allegation presented by the plaintiffs, that “[w]hether Joan Siegemund pursued claims against Nagel and Howe is irrelevant,” Plaintiffs’ Responsive SMF ¶ 9, is not supported by the cited paragraph of the True affidavit and is a question reserved to the court. That paragraph is stricken.

With respect to the remaining two paragraphs of the plaintiffs’ additional statement of material facts, the question whether Shapland had a legal duty to pursue any claims against Nagel and Howe is not raised by the Shapland motion. That issue is raised by the plaintiffs in their opposition to the motion for summary judgment. Plaintiffs’ Memorandum of Law in Opposition to Defendant Shapland’s Motion for Summary Judgment (“Plaintiffs’ Shapland Opposition”) (Docket No. 29) at 17. Expert opinion on this issue would be appropriate at trial and accordingly may be included in a party’s statement of material facts in order to demonstrate a dispute on a point that may be dispositive. Shapland’s motion to strike these paragraphs is denied.

The Shapland defendants also move to strike the exhibits, excerpts from transcripts and affidavits attached to the plaintiffs’ opposition memorandum. They appropriately point out that none of the exhibits is referred to in an affidavit or otherwise certified or authenticated as required by Fed. R. Civ. P. 56(e). Shapland Motion to Strike at 4-6. Each of the numbered exhibits accordingly is stricken. The plaintiffs’ additional statement of facts refers to the True affidavit, which was filed with

the memorandum rather than with that document; the Shapland defendants contend that it should be stricken because it presents only opinion. *Id.* at 8. As previously discussed, this is not a valid reason to exclude an affidavit from a summary judgment record. The motion to strike is denied as to the True affidavit.

The Shapland defendants object to the excerpts from transcripts of hearings and depositions as irrelevant. *Id.* at 7. I agree. In addition, the plaintiffs' statement of additional facts does not refer to these documents, and they may not otherwise be added to the summary judgment record. The motion to strike is granted as to these documents.

The final two attachments to the plaintiffs' memorandum are recent affidavits from John Thornton, Esq., and Karen Siegemund. The Shapland defendants object to the Siegemund affidavit as irrelevant and to the Thornton affidavit as improperly notarized, not made on personal knowledge and irrelevant. I agree that the Thornton affidavit does not comply with the requirement of Fed. R. Civ. P. 56(e) that affidavits submitted in connection with motions for summary judgment be made on personal knowledge and that the substance of the affidavit indicates that many of its assertions could not have been made on personal knowledge. However, it is not necessary to reach that issue because the plaintiffs' statement of additional facts does not refer to either of these affidavits and they are accordingly not properly part of the summary judgment record. The Thornton and Siegemund affidavits are stricken.

2. *Docket No. 42.* The plaintiffs move to strike the reply memorandum filed by the Nagel defendants in connection with their motion to dismiss. Motion to Strike Defendants Ira Nagel and Greenbaum, Nagel, Fisher & Hamelburg's Reply Memorandum (Docket No. 42). They contend that the reply memorandum impermissibly argues collateral estoppel, an issue not raised in the initial motion, and that the reply memorandum's argument on the statute of limitations should be stricken because that

issue is not “new matter.” Memorandum of Law in Support of Motion to Strike Defendants Ira Nagel and Greenbaum, Nagel, Fisher & Hamelburg’s Reply Memorandum (“Plaintiffs’ Nagel Motion to Strike”) (filed with Docket No. 42) at 1-2. Contrary to the plaintiffs’ characterization, the Nagel reply memorandum makes clear that it discusses collateral estoppel only because the plaintiffs’ opposition to the Nagel motion to dismiss makes a concession that makes application of the doctrine of collateral estoppel possible. Defendants Ira Nagel and Greenbaum, Nagel, Fisher and Hamelburg’s Reply Memorandum in Support of Motion to Dismiss (“Nagel Reply Memorandum”) (Docket No. 36) at 4. I conclude later in this opinion that it is unnecessary in any event to reach Nagel’s arguments based on collateral estoppel, but the appropriate response by the plaintiffs to the discussion of this issue in the Nagel reply would be to request leave to file a surreply on the issue, rather than filing a motion to strike.

The plaintiffs’ alternative argument also fails. They invoke this court’s Local Rule 7(c), Plaintiffs’ Nagel Motion to Strike at 2, which provides: “Within eleven (11) days of the filing of any objection to a motion, the moving party may file a reply memorandum, which shall not exceed 7 pages in length and which shall be strictly confined to replying to new matter raised in the objection or opposing memorandum.” The plaintiffs identify the matter which they allege violates this rule as Nagel’s “reply argument with respect to the statute of limitations defense.” *Id.* The discussion of the statute of limitations defense in Nagel’s reply memorandum is quite clearly directed at the arguments raised in the plaintiffs’ opposition. Nagel Reply Memorandum at 1-4.

The motion to strike the Nagel reply memorandum is denied.

3. *Docket No. 43.* The plaintiffs move to strike portions of the reply memorandum filed by the Shapland defendants in connection with their motion for summary judgment. Motion to Strike Portions of Defendants Shapland and Peabody & Arnold’s Reply (Docket No. 43). They contend that section

A(1) of the reply memorandum “simply reiterates arguments made in the original motion” and that section A(3) of that memorandum both “seeks . . . to introduce the issue of collateral estoppel” and “simply reiterates and restates argument previously made.” Plaintiffs’ Memorandum of Law in Support of Their Motion to Strike (submitted with Docket No. 43) at 1-2. Contrary to the plaintiffs’ argument, Local Rule 7(c) does not bar the reiteration of arguments already made in an initial motion, so long as those arguments address new matter raised in the opposition to the motion and particularly where, as here, the reply cites additional authority in support of those arguments. With respect to the doctrine of collateral estoppel, the motion mischaracterizes the Shapland reply memorandum, which does not urge application of that doctrine as an alternative basis for summary judgment. The reply memorandum discusses one Maine case in which the decision of a probate court provided the basis for application of collateral estoppel. Reply Memorandum of Law of Defendants Shapland and Peabody & Arnold in Support of Motion for Summary Judgment (Docket No. 40) at 6-7. A reasonable inference may be drawn from the memorandum’s discussion of that case that the Shapland defendants contend that this holding may be applied by analogy in support of their argument based on the doctrine of *res judicata* in this case. The Shapland defendants do not argue in their reply memorandum that collateral estoppel is an alternative basis for summary judgment; such an argument would be inappropriate and subject to striking. As it has been submitted, however, the memorandum does not contravene Local Rule 7(c).

The motion to strike the Shapland reply memorandum is denied.

B. The Motion for Summary Judgment

The Shapland defendants have moved for summary judgment on the majority of the plaintiffs' claims against them on the ground of *res judicata*.³ They argue in the alternative that the plaintiffs cannot establish any damages because they could have brought directly the claims against Nagel and Howe that they contend Shapland failed to bring.⁴ The amended complaint asserts the following claims against Shapland:⁵ breach of fiduciary duty and negligence, negligent and intentional infliction of emotional distress (Counts I, II & X); violation of the Massachusetts Consumer Protection Act (Counts III & VII); and conspiracy (Count IX). Amended Complaint ¶¶ 62-81, 95-98, 103-09. The Shapland defendants assert that they are entitled to summary judgment because the plaintiffs' claims arise out of the failure of Shapland as personal representative to bring the underlying claims against Howe and Nagel, Amended Complaint ¶¶ 56-60, 63, 66-69, 72, 76, 80-81, and those claims are barred by *res judicata*. Memorandum of Law in Support of Defendants, [sic] Peter Shapland and Peabody & Arnold LLP, for Summary Judgment ("Shapland Judgment Memorandum") (filed with Docket No. 14) at 2.

[T]he federal doctrine of *res judicata*, or claim preclusion, bars a subsequent action whenever three criteria are met: (1) there is a final judgment on the merits in an earlier action; (2) "sufficient identity" exists between the parties in the earlier and later suits, and (3) "sufficient identity" exists between the causes of action in the two suits.

³ The plaintiffs filed a document styled "Motion for Clarification from the Court" contending that the motion for summary judgment should be treated as a motion to dismiss and requesting additional time to respond if the court chooses to treat the motion as one for summary judgment. Docket No. 31. The Shapland defendants filed a response in which they reiterated their intent that their motion be treated as one for summary judgment, in accordance with the title which they gave it. Memorandum of Law of Defendants, [sic] Peter Shapland and Peabody & Arnold LLP, in Response to Plaintiffs' Motion for Clarification (Docket No. 38). That response sufficiently addresses the concerns raised by the plaintiffs; the plaintiffs have demonstrated no need for additional time in which to respond to the motion for summary judgment. To the extent that the matter is not moot, the motion for clarification is denied.

⁴ The plaintiffs state in their opposition to the motion that "Defendant Shapland has only brought his Motion for Summary Judgment against one Plaintiff, Joan Siegemund" and that the claims of the estate must accordingly survive even if the motion is granted. Plaintiffs' Shapland Opposition at 15. This characterization of the motion for summary judgment is incorrect; it is reasonably read as seeking summary judgment on the claims of all plaintiffs.

⁵ The amended complaint makes no independent claims against any of the three law firm defendants. The plaintiffs apparently contend that these defendants are vicariously liable for the acts of the attorney defendants who are described as being "with" each of them. Amended Complaint ¶¶ 3-5. There are no allegations of vicarious liability in the amended complaint. Hereinafter, reference to one of the attorney defendants will also be a reference to the defendant law firm which he is alleged to be "with" unless otherwise specified.

United States v. Cunan, 156 F.3d 110, 114 (1st Cir. 1998). “Maine, whose earlier judgment is invoked here as *res judicata*, employs [a functional ‘same transaction’ test in determining whether the cause of action in the two cases is the same], which is therefore binding” in this court. *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 985 F.2d 27, 30 (1st Cir. 1993). Shapland also invokes earlier judgments from the Commonwealth of Massachusetts, which employs essentially the same test. *Hermes Automation Tech., Inc. v. Hyundai Elec. Indus. Co.*, 915 F.2d 739, 750 (1st Cir. 1990).

Under Maine law,

[c]laim preclusion bars the relitigation of a claim if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action. To determine whether the matters presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case. We apply a transactional test to define a cause of action, pursuant to which the measure of a cause of action is the aggregate of connected operative facts that can be handled together conveniently for purposes of trial. A prior judgment bars a later suit arising out of the same aggregate of operative facts even though the second suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves evidence different from that evidence relevant to the first case.

Johnson v. Samson Constr. Corp., 704 A.2d 866, 868 (Me. 1997) (citations and internal punctuation omitted). The plaintiffs challenge all three elements.

Shapland relies on orders and judgments of the probate courts in Massachusetts and Maine issued during the guardianship of Dr. Winston. The plaintiffs first argue that orders of a probate court cannot provide the basis for application of *res judicata*. Plaintiffs’ Shapland Opposition at 11. If the plaintiffs mean to argue that, as a general proposition, judgments of the probate court cannot serve as the basis for *res judicata* in a civil court of general jurisdiction, they are wrong under both Massachusetts and Maine law. *See generally Person v. Flynn*, 3 Mass.L.Rptr. 74, 1995 WL 809580

at *1 (Mass. Super. June 9, 1995); *Marin v. Marin*, 797 A.2d 1265, 1267 (Me. 2002) (discussing whether particular judgment of probate court served as *res judicata* under circumstances).

The plaintiffs next assert that the parties in this action are not the same as the parties in the Massachusetts and Maine probate court actions because the estate of Dr. Winston, a named plaintiff in this action, was not, and could not have been, a party in those cases. Plaintiffs' Shapland Opposition at 15-16. Again, the law of both states is to the contrary. Joan Siegemund was one of two heirs to the estate of Dr. Winston. Findings of Fact and Conclusions of Law [dated October 3, 1989], *In re Guardianship of Rose Winston*, Massachusetts Probate and Family Court (Suffolk County), Docket No. 87P2290 ("Bowser Judgment") (Exh. O to Shapland SMF), at 1 ¶2. The estate of Dr. Winston is clearly her "privy," to the extent that it was Joan Siegemund and not the estate that brought the earlier claims in the probate courts. *See Dwight v. Dwight*, 357 N.E.2d 772, 775 (Mass. 1976) (beneficiaries of trust bound by prior action of guardian ad litem brought on behalf of trust); *Laughlin v. Page*, 108 Me. 307, 315-16, 80 A. 753, 756 (1911) (heirs are "privies in blood" of an individual and thus of his or her estate).

Next, the plaintiffs contend that the decisions of the state probate courts on which Shapland relies are not final judgments for purposes of claim preclusion. Plaintiffs' Shapland Opposition at 16-17. The plaintiffs make no argument concerning the action brought by Joan Siegemund in the Maine probate court, and that is clearly not the case with the decision of the Maine courts. Joan Siegemund took a successful appeal in 1992 from the initial decision of the Maine probate court in Washington County to the effect that it did not have jurisdiction over her *ex parte* request to be appointed guardian of Dr. Winston but was denied relief on the merits because the record evidence supported the probate court's alternate finding that there was insufficient evidence to establish justification for granting the

request. *Guardianship of Rose Winston*, 607 A.2d 907, 908 (Me. 1992). This is obviously a final judgment as to issues that were or could have been raised in the Maine proceeding.

With respect to the orders of the Massachusetts probate court, the plaintiffs contend that the Massachusetts action has not been closed, making all orders entered in that case still subject to appeal and thus not final. Plaintiffs' Shapland Opposition at 16-17. Shapland responds that he relies primarily on three orders of the Massachusetts probate court: (i) the Bowser judgment, which was entered after trial on the petitions of Nagel to be appointed permanent guardian of the person, of Howe to be appointed permanent guardian of the property, and of Joan Siegemund to be appointed permanent guardian of both, Bowser Judgment at 1; (ii) an order dated June 5, 1992 by Justice Smoot granting Howe's motion to confirm the sale of the Hereford Street property, Motion to Confirm Sale of Real Estate [with margin endorsement], *In re Guardianship of Rose Winston*, Massachusetts Probate and Family Court (Suffolk County), Docket No. 87P-2290 ("Smoot 1992 Order") (Exh. U to Shapland SMF); and (iii) an order dated February 2, 1993 by Justice Smoot continuing the guardianships of Nagel and Howe, Order, *In re Rose Winston*, Massachusetts Probate and Family Court (Suffolk County), Docket No. 87P2290 ("Smoot 1993 Order") (Exh. Z to Shapland SMF). Reply Memorandum of Law of Defendants Peter Shapland and Peabody & Arnold LLP In Support of Motion for Summary Judgment (Docket No. 40) at 2. Shapland argues, *id.* at 3, that these orders and the judgment are final for purposes of application of *res judicata* because they are immediately appealable pursuant to M.G.L. c. 215 § 9, which provides:

A person aggrieved by an order, judgment, decree or denial of a probate court made after this chapter takes effect, may, within thirty days after the entry thereof, appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the full court of the supreme judicial court. Said courts shall have like powers and authority with respect thereto as upon an appeal in any civil action.

It is not necessary under Massachusetts law that the order at issue be dispositive of the entire case before an appeal can be taken. *Mancuso v. Mancuso*, 408 N.E.2d 652, 655-56 (Mass. App. 1980). Indeed, where the issues involved are the permanent appointment of guardians for the person and property of an incapacitated person and the sale of real property owned by that person, preventing appeal until the termination of probate proceeding by termination of the guardianship, whether by death of the ward or otherwise, or for some other reason, would have the practical effect of preventing any review of such decisions by the probate court. The Supreme Judicial Court of Massachusetts considered this issue in *Borman v. Borman*, 393 N.E.2d 847, 850, 851 (Mass. 1979), in which it held, in an appeal from an order of the probate court, that “if the decree is to be executed presently, so that an appeal would be futile unless the decree could be vacated by the prompt entry of an appeal . . . the decree is a final one.” Joan Siegemund had standing to appeal from each of these three orders. M.G.L. c. 215 § 9. There is no allegation in the amended complaint that she took any such appeal and the plaintiffs have not provided any evidence that she did so in response to Shapland’s motion. The orders at issue must be deemed to have been final for purposes of application of *res judicata* under Massachusetts law.

Finally, the plaintiffs contend that the claims presented in the instant action could not have been brought in the Maine and Massachusetts probate proceedings. Plaintiffs’ Shapland Opposition at 12-15. Specifically, the amended complaint in this action alleges that the Shapland defendants: (i) breached their fiduciary duty to the estate of Dr. Winston and to Joan Siegemund as an heir of that estate⁶ by failing to pursue claims for negligence, breach of fiduciary duty, negligent and intentional infliction of emotional distress, fraud and violation of the Massachusetts Consumer Protection Act

⁶ The amended complaint asserts that the Shapland defendants owed a fiduciary duty to “the heirs of [Dr. Winston’s] estate,” Amended Complaint ¶ 63, but it does not allege that Joan Siegemund in any way represents the interests of her sister, the only other heir to that estate.

“held by the Estate of Rose Winston” against Howe, Nagel and their law firms and by intentionally withholding from Joan Siegemund information pertaining to physical and financial mismanagement by those defendants, Amended Complaint ¶¶ 63, 66-67, 72, 78-81; (ii) engaged in unfair trade practices in violation of the Massachusetts Consumer Protection Act, *id.* ¶¶ 96-98; (iii) engaged in conspiracy with the other defendants, *id.* ¶ 104; and (iv) breached fiduciary and common-law duties to the plaintiffs not to let the statute of limitations run on any claims against Howe, Nagel and their respective law firms, *id.* ¶¶ 107-08. The way in which the Shapland defendants are alleged to have violated the Massachusetts Consumer Protection Act is not specified in the amended complaint.

If *res judicata* bars the underlying claims against Howe and Nagel, the Shapland defendants cannot be faulted for failing to assert such claims or for refusing to provide Joan Siegemund with any unspecified information relevant to those claims, and all claims based on an alleged failure to pursue those claims are barred as a matter of law. Because the plaintiffs do not specify in their amended complaint or in their opposition to the motion for summary judgment any basis for their claim under the Massachusetts Consumer Protection Act other than the actions or inactions that form the basis of their claims for negligence and breach of fiduciary duty, the statutory claim will be subject to the same fate as the tort claims. Finally, if the amended complaint fails to state a claim on the alleged breaches of duty, no claim for civil conspiracy may be maintained, *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998), and Count IX would therefore be subject to dismissal as well.

In the Maine guardianship action, Joan Siegemund alleged that Dr. Winston was “under the control of persons who have in the past placed her at [sic] a near-comatose state” and that Ms. Pitman was “an agent of said persons, and ha[d] a vested interest as well.” Petition for Appointment of Guardian for Incapacitated Person, *In re Dr. Rose Winston*, Maine Probate Court (Washington

County), Docket No. 91-192 (Exh. V to Shapland SMF) at 2. Joan Siegemund's petition sought her appointment as guardian of Dr. Winston on an emergency basis, without notice to Nagel or Howe, and stated that she believed that "there are no more funds available due to mismanagement of her estate" and that Dr. Winston had "suffered grievous mental harm as result of 8-9 months of Haldol and other drugs or lack thereof." *Id.* at 3. A written statement attached to the petition includes the following assertions:

1) My mother remains under the control of Mr. Ira Nagel, the Boston guardian in charge when my mother received large doses of Haldol over a 8-9 month period when her heart medication was discontinued. Ms Audrey Pittman [sic] receives about \$4000/month from my mother's estate for caring for my mother.

2) According to Ms Pittman [sic], she gives my mother Valium "when she needs it". I do not know how often, in Ms Pittman's [sic] opinion, my mother "needs it". She gives her other tranquillizers [sic] also.

3) Dr. Larsen and Ms Pittman [sic] differ in their opinion of the proper dosage of my mother's heart medication. Dr. Larsen stated to me that my mother is to have one nitro patch, and Ms Pittman [sic] says she puts on two. Dr. Larsen said the single patch might be taken off at night, Ms Pittman [sic] says she removes both patches at night.

4) . . . When [my mother] does manage to formulate words, she has difficulty speaking these words: "I don't feel well", which are shrugged off by her keepers, or met with more drugs.

5) In similar circumstances in the summer of 1988 when a sales agreement was concluded on four of my mother's buildings, my mother was near death from Haldol and absence of heart medication. Today, another sales agreement has been signed. As before, however, a sale before death would entail grave tax consequences.

6) . . . Last winter [my mother] contracted pneumonia, and once, she suffered tachicardia [sic] and fainted in her doctor's office because what was described to be as [sic] faulty dosage of her heart medicine. . . .

7) Mr. Nagel has refused to release the ward's medical records at Down East Community Hospital. In this regard, I respectfully request that you order their immediate release to me. . . .

“The Medical Emergency Requiring Appointment of Temporary Guardian-Executrix to Remove the Ward from Audrey Pittman’s and Ira Nagel’s Control,” Attachment to Exh. V to Shapland SMF, at [1]-[2] (emphasis in original). A letter dated October 22, 1991 from Joan Siegemund to the judge of probate in Washington County includes the following assertions:

Shortly after Mr. Nagel began overseeing the care of my mother in her home in Boston, she started to hallucinate, and my family was harassed into staying away. False accusations were made that we annoyed her by discussing her will . . . , tired her, caused her to reenter the hospital, etc. . . .

My mother was indeed sleeping. She was sleeping the drugged sleep of Haldol She was also sleeping from other tranquilizers used in conjunction with Haldol. And she was also deprived of all of her heart medicines. By the time I learned the truth, my mother had been brought to the brink of death several times, culminating in the July 5, 1988 near-comatose state revealed weepingly to my [sic] by the nurse then on duty.

As Mr. Nagel forbade any independent doctor from examining my mother, she was not brought to the hospital. In short, my mother was a prisoner in her own home, and deprived of authentic medical attention. In my opinion she was being systematically murdered for 8-9 months, and help from any source was strictly barred.

On my visits . . . she would repeatedly go to the door and ask to be allowed to leave. She knew she was a prisoner and said so clearly. When my husband and I visited in May 1989 we were locked in her apartment, possibly to foil any attempt to remove her. We detected what I later learned were typical Haldol long-dose overdose symptoms, such as skin blotches, pointing to under her eyes, pulling her ears, etc. . . .

Around March 1988, when the Haldol was apparently stepped up, and the heart medicines withheld, she decline [sic] noticeably. From that time on she was tied in a wheelchair, drooling, unable to speak. I later found in Mr. Nagel’s time-sheets mention of “bed restraints” and the ordering of a hospital bed, wheelchair and suction device. . . .

Finally, on July 5, 1988, one of her nurses told me in a frantic voice that my mother was near-comatose, and dying. My mother’s doctor . . . was on vacation . . . [;] his associate . . . refused to return my calls. The male nurse/janitor (whom my doctor-mother had yars [sic] before had [sic] informed me was a schizophrenic) in my mother’s building who was charged with administering her medicine, refused to call Mr. Nagel, who was “not available”. I spent several hours on the phone before managing to persuade

the original committing psychiatrist . . . to make an emergency house call to my mother. . . .

His report of that visit showed that **no heart medicines** of any kind were being administered to me [sic] mother — only Ativan, a tranquilizer. I was then convinced that she had been intended to die that week-end [sic], and that [the psychiatrist's] prompt answer to my distress call narrowly averted her death. She had been improving mentally until recently

As mentioned earlier, four of the ward's apartment buildings were to be sold late July [sic], when [the psychiatrist] and I intervened. I believe her death was then planned and anticipated for purposes of avoiding onerous tax consequences. The date of the Sales Agreement was the end of July!

My mother did not die . . . and the buildings were not sold.

The same buildings, however, are once again awaiting sale. Another Sales Agreement is once again signed the date of which I do not know . . . and, once again, her "timely" death, is, I believe, anticipated after the onset of the cold weather.

Letter to Judge Holmes signed by Joan L. Siegemund "under penalty of perjury" on October 23, 1991, attached to Exh. V to Shapland SMF, at [1]-[4] (emphasis in original).

The judge who conducted a hearing on Joan Siegemund's Maine petition heard two and one-half hours of testimony and argument from Mrs. Siegemund. Order [dated September 8, 1992], *In re Rose Winston*, Maine Probate Court (Washington County), Docket No. 91-192, attached to Exh. V to Shapland SMF, at [1]. "Most of that presentation consisted of accusations made by Ms. Siegemund against the guardian, Ira Nagel, in which he was accused of attempting to murder Rose Winston . . . [and] of having some unspecified involvement in the death of an employee of Resthaven Nursing Home." *Id.* He found that "[f]rom the evidence presented . . . I cannot find that any emergency exists which jeopardizes the welfare of Rose Winston. . . . The characterization of Mr. Nagel by Joan Siegemund as a "sadistic murderer" was not substantiated by any evidence." *Id.* at [2]. The judge also noted that Mrs. Siegemund had filed a motion asking that Nagel be ordered to provide her with medical records and other documents pertaining to her mother; he stated that such a motion "is . . . best

addressed by the Massachusetts court appointing Mr. Nagel as guardian, and I also deny that motion.”

Id.

To the extent that the plaintiffs in this action contend that Shapland or Nagel’s failure to provide Joan Siegemund with the documents that were the subject of her motion in the Washington County probate court provide the basis for a claim against them, this order bars such claims by operation of *res judicata*. To the extent that the direct claims against Nagel and Howe are based on the actions or failures to act that were presented to the Washington County probate court, any such claims, and any claims against Shapland for failing to pursue such claims, are also barred. These claims include the all or part of the following paragraphs of the amended complaint: 12, 14-16, 19, 22, 58, 60, 65-66, 72-73, 76, 85.

In its order on the petitions of Nagel, Howe and Joan Siegemund to be appointed permanent guardians, the Massachusetts probate court made the following relevant factual findings:

16. David O’Brien is a licensed practical [sic] nurse who has been a tenant in the . . . building owned and occupied by the Ward for the past ten years. He administers medication to the Ward in accordance with the instructions of Dr. Pier

17. Dr. Pier’s care and treatment of the Ward is appropriate and in the Ward’s best interests.

18. David O’Brien’s care and treatment of the Ward is appropriate and in her bests [sic] interests.

* * *

20. Relations between the Ward’s two daughters and their families are strained. As a result, by Court order, visitation by family members with the Ward at her home are coordinated through . . . the Probate and Family Court Department

* * *

22. Throughout the pendency of this matter, Joan Siegemund has resisted and refused cooperation with either temporary guardian. She has alleged that the Ward’s granddaughter, Debra Crocker, has abused the Ward. She has alleged that Dr. Pier has withheld medication from the Ward and administered unauthorized medication to the Ward. On one occasion, Dr. Pier administered Haldol to the Ward and immediately terminated administration upon learning from the temporary guardian of the person that

Court authorization was necessary. She has alleged that Mr. O'Brien has mistreated the Ward. She has alleged that nurses aides employed by Medical Personnel Pool have mistreated the Ward. She has alleged that the Ward is held captive in her home. She has alleged that the Guardian ad Litem is a co-conspirator along with Mr. Howe, Mr. Nagle [sic], Mr. O'Brien, Dr. Pier and others in a cover up of the Ward's mistreatment and abuse.

23. Joan Siegemund, the Ward's daughter, has initiated requests for investigations into the conduct of the various parties, to be carried out by, among [sic] others, the Department of Elder Affairs, Central Boston Elder Services, Senator Edward Kennedy's Office, Governor Michael Dukakis' Office, the Boston Police Department, the Suffolk District Attorney's Office, the Board of Registration in Medicine, the Board of Bar Overseers and the United States Attorney's Office. There was no evidence that any of these investigations resulted in any evidence of mistreatment of the Ward.

* * *

25. The Guardian ad Litem has recommended the permanent appointment of Ira Nagle [sic] as guardian of the person of the Ward.

* * *

29. Since his appointment, Stephen Howe has managed the estate of the Ward adequately and competently to provide for her needs.

* * *

40. I find . . . that were it not for the objections filed by Joan Siegemund the[] expenses [of the attorney for the temporary guardian of the person] would have been unnecessary. Furthermore, I find that the evidence did not support the ferocity of her objections.

Bowser Judgment at 3-6. The court entered the following conclusions of law, among others:

1. The temporary guardian of the person of Rose Winston has ably and professionally conducted his duties in the best interests of the ward.
2. The best interests of the Ward require that the temporary guardian's appointment become permanent.
3. The temporary guardian of the property of the Ward has ably and professionally conducted his duties in the best interests of the Ward.
4. The best interests of the Ward require that the temporary guardian's [sic] become permanent.
5. The legal fees charged by the temporary guardian of the person of the Ward are fair and reasonable and proper charges to the Estate of the Ward.

Id. at 7. These findings and conclusions serve as *res judicata* barring any claims against Howe and Nagel arising out of their guardianships before October 3, 1989, the date of the order. The following paragraphs of the amended complaint include such allegations: 12-16, 19-20, 45, 47-49, 54, 85, 94.

In an order dated June 5, 1992 the Massachusetts probate court approved the sale of Dr. Winston's Hereford Street real estate. Exh. U to Shapland SMF. This order bars any claims against Howe arising out of this sale. The following paragraphs of the amended complaint include allegations arising out of this sale: 49, 51-53, 94. On February 2, 1993 the Massachusetts probate court issued the following order:

The Court having examined the guardian ad litem report dated August 21, 1992, it is ordered that the guardians of the person and estate of Dr. Rose Winston shall maintain the status quo unless either guardian deems it in Rose Winston's best interest to pursue a different course of action or the Court otherwise orders.

Exh. Z to Shapland SMF. The report to which this order refers is Exhibit Y to the Shapland statement of material facts. It recites that the guardian ad litem was appointed by the Massachusetts probate court on March 26, 1992 to investigate and report to the court on the physical and mental condition of Dr. Winston, her present and past health care and initiatives by the guardians. Report of Guardian ad Litem [dated August 21, 1992], Exh. Y to Shapland SMF, at 1. The guardian reported on an extensive investigation and found that Dr. Winston was receiving "good, adequate, quality care." *Id.* at 13. This court order bars any claims against the guardians arising after October 3, 1989 and before February 2, 1993, which appear in the following paragraphs of the amended complaint: 19, 21-25, 27-30, 32-33.

The amended complaint also includes the following allegation of specific conduct by Howe occurring before February 2, 1993 that is not mentioned in the documents submitted to the court with respect to the orders of the Maine and Massachusetts probate courts discussed above: he oversaw the improper eviction of tenants from the Hereford Street properties, resulting in the filing of lawsuits

against Dr. Winston that were settled for an amount in excess of \$20,000 and caused the estate to incur “significant” legal fees. Amended Complaint ¶ 50.

The plaintiffs contend that *res judicata* does not bar their claims against Howe and Nagel for the period up to February 2, 1993 because the probate courts could not provide damages, which is the relief sought in this action, and because they raise claims different from those raised in the probate proceedings. Plaintiffs’ Shapland Opposition at 14. However, the claims asserted in the amended complaint, as set forth above, are not different from those asserted in the probate cases. Even if the claims were different, reliance on a new legal theory not advanced in the first action does not prevent the application of *res judicata*. *Johnson*, 704 A.2d at 868. Nor does the fact that different relief is sought make the doctrine of *res judicata* inapplicable. *Id.* Under Maine law, applicable with respect to the role of *res judicata* in this case which was brought in the Maine state courts and removed to this court on the basis of diversity jurisdiction, “[w]hat was or could have been considered in the first action cannot be the basis of a subsequent action.” *Lewis v. Maine Coast Artists*, 770 A.2d 644, 649 (Me. 2001). Claims in the two actions at issue “are the same if they are part of the same transaction, i.e., they are founded upon the same transaction, arise out of the same nucleus of operative facts, and seek redress for essentially the same basic wrong.” *Id.* (citation and internal punctuation omitted). “To determine whether facts arise out of the same transaction, we consider whether the facts are related in time, space, origin, or motivation.” *Id.* All of the factual allegations in the amended complaint concerning the activities of Howe and Nagel before February 2, 1993, including the allegations concerning Howe’s eviction of tenants and the resulting lawsuits, meet this test.

If the federal law of *res judicata* were applicable, the result would be the same. *Cunan*, 156 F.3d at 114 (sufficient identity exists between claims in first and second actions for purposes of doctrine when causes of action embrace all rights of plaintiff to remedies against defendant with

respect to any part of transaction or series of connected transactions out of which the actions arose). “This boils down to whether the causes of action arise out of a common nucleus of operative facts.” *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass’n*, 142 F.3d 26, 38 (1st Cir. 1998).

The plaintiffs also contend, in summary fashion, that “fraud is an exception to the doctrine of *res judicata*,” and that their claims of breach of fiduciary duty or constructive fraud accordingly are not barred. Plaintiffs’ Shapland Opposition at 12. Under Maine law, a fraud claim is not barred by the doctrine of *res judicata* unless the plaintiff knew of the fraud at the time of the first action. *Sargent v. Sargent*, 622 A.2d 721, 723 (Me. 1993). *See also Kradoska v. Kipp*, 397 A.2d 562, 568 (Me. 1979). The First Circuit applies the same standard. *In re Newport Harbor Assocs.*, 589 F.2d 20, 24 (1st Cir. 1978) (action for fraud not barred by *res judicata* where fraud could not have been asserted in prior proceeding). Here, the amended complaint, as well as Joan Siegemund’s submissions to the Maine and Massachusetts probate courts, make clear that she was aware before the relevant orders were entered in those actions of any fraud that the amended complaint may reasonably be construed to allege. She may not maintain her claims against Howe and Nagel on this basis.

The amended complaint also includes factual allegations against Nagel and Howe based on events that occurred after February 2, 1993. Amended Complaint ¶¶ 34-44, 85. Dr. Winston died on March 18, 1993. *Id.* ¶ 41. The only allegation against either guardian concerning an event occurring after that date is that Howe caused Joan Siegemund severe emotional distress by authorizing cremation without authority to do so. *Id.* ¶ 42. Although no date is included in the statements of material fact, it may nevertheless reasonably be inferred that any such action took place before October 15, 1995, which was six years before the instant action was commenced in Maine state court. Notice of Removal (Docket No. 1) ¶ 1. This date is significant for purposes of the statute of limitations, which is six years under Maine law for most tort claims. 14 M.R.S.A. § 752. However, Shapland does not

argue that these claims are barred by the statute of limitations. Rather, he contends that the plaintiffs cannot have been harmed by his alleged failure to sue Howe and Nagel on the basis of these events because the plaintiffs could have brought such an action directly. Shapland Judgment Memorandum at 18-21. Of course, only Joan Siegemund could sue Howe for the alleged emotional distress caused her by Howe's approval of cremation.

Massachusetts law provides for direct action by an heir when an administrator or executor refuses to bring an action.

It shall be unnecessary to remove an executor or administrator in order that an action to enforce a claim in favor of the estate may be brought by an administrator to be appointed in his place, when he refuses to bring such action at the request of an heir, legatee or creditor, or is unable to do so by reason of his interest or otherwise, but an heir, legatee or creditor having an interest in the enforcement of any such claim may bring a civil action to enforce it for the benefit of the estate in like circumstances and in like manner as a person beneficially interested in a trust fund may bring an action to enforce a claim in favor of such fund

M. G. L. c. 230 § 5. With respect to any possible claims of the estate falling within the relevant period, the plaintiffs argue that they had no duty or obligation to sue Howe and Nagel directly and that Shapland had such a duty. Plaintiffs' Shapland Opposition at 17-18. Even if that were the case, the fact that the plaintiffs could have recovered their damages directly is dispositive of their claim against Shapland on this point, because they could have recovered by their own action the damages they allege they have incurred due to Shapland's inaction with respect to these events. A party who chooses to sit or sleep on his rights may not thereafter seek to recover against a third party who might also have pursued such a claim. *See generally In re Andersen*, 179 F.3d 1253, 1257 (10th Cir 1999) (creditor may not sit on its rights and expect that trustee will assume duty of protecting its interests); *Allen v. Columbus Bank & Trust Co.*, 534 S.E.2d 917, 924 (Ga. App. 2000) (trust beneficiary may not sit on her rights and later sue trustee). The estate was not harmed by Shapland's alleged breach of duty

because Joan Siegemund at all relevant times had the legal capacity to obtain the damages she now seeks from Shapland directly from Howe and Nagel under the Massachusetts statute set forth above.⁷

The only remaining claim against Shapland is that he negligently or intentionally inflicted emotional distress on Joan Siegemund by refusing to pursue legal action against Howe and Nagel. Because such action would have been barred by *res judicata* or, with respect to actions or inactions by Howe and Nagel after February 2, 1993, could have been brought by Joan Siegemund directly, she has no claim against Shapland for emotional distress as a matter of law. Under Maine law, in order to state a claim for negligent infliction of emotional distress, a plaintiff must set forth facts from which it could be concluded, *inter alia*, that the defendant owed a duty to the plaintiff and that the plaintiff was harmed. *Curtis v. Porter*, 784 A.2d 18, 25 (Me. 2001). There is no general duty to avoid negligently causing emotional harm to others. *Id.* As discussed above, Shapland had no duty to undertake claims against Howe and Nagel on which he could not recover, and the plaintiffs were not harmed by his failure to press claims against Howe and Nagel for events that took place between February 2, 1993 and shortly after the death of Dr. Winston. Nor do the plaintiffs present evidence of the elements of a bystander liability action, the only other circumstance in which such a claim may be pursued. *Id.* Accordingly, any claim for negligent infliction of emotional distress on Joan Siegemund by Shapland must fail.

With respect to the claim for intentional infliction of emotional distress on Joan Siegemund, the plaintiffs must prove four elements:

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct;

⁷ It is highly unlikely, based on the evidence in the summary judgment record, that the estate was injured by any actions of Howe or Nagel between February 2 and March 18, 1993, but that is an issue that the court need not reach under the circumstances.

(2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;

(3) the actions of the defendant caused the plaintiff's emotional distress;
and

(4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Id. at 22-23 (citation and internal punctuation omitted). The alleged actions or failures to act by Shapland alleged in the amended complaint and discussed above do not and cannot, on the basis of the summary judgment record, rise to the level of the second element of this claim. Shapland is entitled to summary judgment on the plaintiffs' claims against him for negligent and intentional infliction of emotional distress.

The Shapland defendants are entitled to summary judgment on all claims asserted against them in the amended complaint.

C. The Motions to Dismiss

1. The Howe Motion. The Howe defendants have filed a motion to dismiss the claims against them that begins with an inappropriate recitation of facts unaccompanied by citation to any supporting documentation. Howe Dismissal Motion at [1]-[3]. Were the court to consider these factual assertions in connection with the motion, Fed. R. Civ. P. 12(b) would require that the motion be treated as one for summary judgment. I decline to do so and note that the presentation of facts in the Howe motion would in any event be unacceptable under this court's Local Rule 56 for purposes of summary judgment.

The Howe defendants contend that the claims against them are barred by the Massachusetts statute of limitations. Howe Dismissal Motion at [3]. They also argue, in cursory fashion, that Massachusetts law bars the claims because Howe's final accounting has been allowed and that Joan

Siegemund lacks standing to bring claims on behalf of the estate of Dr. Winston. *Id.* at [4]. Attached to the motion are an order of the Massachusetts Probate and Family Court striking the objections of Joan Siegemund to the accounts of the guardian, copies of M.G.L. c. 206 §§ 21-22 and c. 260 § 2A and judgments of the Massachusetts Probate and Family Court allowing the final accounts of Howe as guardian.

The plaintiffs in response first move to strike all of the attachments to the motion, asserting that this court may not review any materials outside the pleadings without converting the motion into one for summary judgment. Joan Siegemund's⁸ Response to Stephen Howe and Dane & Howe's Motion to Dismiss the Complaint, etc. ("Plaintiffs' Howe Opposition") (Docket No. 19) at 4. That contention is incorrect. A court may consider certain documents in addition to the complaint when evaluating a motion to dismiss under Rule 12(b)(6) without converting the motion into one for summary judgment.

Ordinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.

There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint. When the complaint relies upon a document, whose authenticity is not challenged, such a document merges into the pleadings and the court may properly consider it under a Rule 12(b)(6) motion to dismiss.

Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001) (citations and internal quotation marks omitted). Here, the copies of Massachusetts statutes are provided only as a courtesy, since they must obviously be consulted by the court in some form in connection with the motion. The plaintiffs do not challenge the authenticity of the other documents, all of which are orders or judgments of the Massachusetts probate court. Such documents are also obviously official public records. If the complaint fails to state a claim on which relief may be

granted based on one or more of those documents, the court may review it or them without converting the motion into one for summary judgment. *Id.* at 34.

The plaintiffs next contend that, because the amended complaint does not plead that Howe's final accounting has been allowed by the Massachusetts probate court, this court may not consider that fact in connection with a motion to dismiss. Plaintiffs' Howe Opposition at 5. Such an approach would unduly elevate form over substance; if a claim is subject to dismissal due to a fact which the plaintiff has carefully omitted from her complaint, the defendant is allowed to bring that fact to the court's attention so long as the means for doing so fits within the categories of documents listed above. *Alternative Energy*, 267 F.3d at 33-34. That is the case here.

The plaintiffs appropriately point out that the Howe motion assumes the applicability of Massachusetts law to all claims asserted against the Howe defendants despite the fact that the amended complaint alleges that some of Howe's challenged actions took place in Maine and that his alleged actions and failures to act had their primary effects in Maine after Dr. Winston moved to this state. Plaintiffs' Howe Opposition at 7-8. It is not necessary to decide the choice-of-law question, however, because Howe's motion fails under the law of Massachusetts, which is the only law upon which it relies.

Under M.G.L. c. 230 § 5, discussed earlier, Joan Siegemund, an heir and legatee of Dr. Winston, had standing to bring an action against Howe on behalf of the estate.

Howe relies on the following statute of limitations:

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

⁸ Despite its title, the body of this document makes clear that the opposition is filed by all of the named plaintiffs.

M.G.L. c. 260 § 2A. He contends that none of the plaintiffs' claims against him could have accrued after the death of Dr. Winston on March 18, 1993. Howe Dismissal Motion at [3]. The plaintiffs do not challenge Howe's necessarily-implied characterization of their claims against him as sounding in tort, but rather contend that their allegations of fraud overcome the statute of limitations at the pleading stage. Plaintiffs' Howe Opposition at 5-6.

Massachusetts law also provides that the final account filed in the probate court may only be impeached for fraud or manifest error. M.G.L. c. 206 § 24. Since Howe's final account was not allowed until October 10, 2001, it appears that anything included in that account may still be impeached for fraud or manifest error under Massachusetts law. Howe was the guardian of Dr. Winston's property and presumably all of his actions with respect to that property are included in his final account. The amended complaint does allege fraud by Howe, Amended Complaint ¶¶ 48-54, 64-65, and Howe does not challenge the sufficiency of that pleading. Massachusetts law thus does provide otherwise, within the meaning of that term as used in M.G.L. c. 260 § 2A, and the Howe defendants are not entitled to dismissal of the claims asserted against them on the basis of that statute of limitations.

Howe's argument concerning the bar erected by M.G.L. c. 206 § 24 does not mention the exception for fraud. Again, because fraud is pleaded and the adequacy of that pleading is not challenged, the Howe defendants are not entitled to dismissal on the basis of the statutory finality of accounts under Massachusetts probate law.

The motion of the Howe defendants to dismiss should be denied.

2. *The Nagel Motion.* The Nagel defendants move to dismiss the claims against them on the grounds of *res judicata* and the applicable statutes of limitations. Nagel Motion at 1-2. I have already

concluded, for the reasons discussed above, that the plaintiffs' claims against Nagel and his law firm are barred by *res judicata*. Accordingly, I recommend that this motion be granted.

3. *The Motion to Dismiss the Cross-Claim.* Stephen Howe moves to dismiss the cross-claim filed against him by the Shapland defendants. Howe Crossclaim Motion. In summary fashion, the motion asserts that "there is no allegation of any duty which [Stephen Howe] owed to either the defendant Peter Shapland or the defendant Peabody and Arnold, LLP" and that any judgment that might be entered against either in this action "would have nothing whatever to do with any activities or conduct of Stephen Howe." *Id.* at 1-2.

If the court adopts my recommendation that summary judgment be granted in favor of the Shapland defendants on all counts asserted against them, this motion will become moot. If the court rejects my recommendation in whole or in part, I recommend that this motion be denied.

In Count I, the cross-claim seeks contribution and indemnification from Howe in the event of a judgment against the Shapland defendants for failing to pursue legal remedies against him. Cross-Claim (Docket No. 24) ¶ 6. A defendant need not allege the existence of a duty or a special relationship in order to state a claim for contribution or indemnification against another defendant. *See generally Bedell v. Reagan*, 159 Me. 292, 295-99 (1963) (contribution); *Roberts v. American Chain & Cable Co.*, 259 A.2d 43, 50 (Me. 1969) (contribution and indemnification). Contrary to Howe's second contention, a judgment against the Shapland defendants in this action could have everything to do with the activities or conduct of Howe. If Shapland were found liable to the plaintiffs for failing to pursue claims against Howe, one of two primary bases for the amended complaint, Shapland could only be a "passive" tortfeasor as that term is used in *Emery v. Hussey Seating Co.*, 697 A.2d 1284, 1288 (Me. 1997). Shapland's liability would arise merely from his failure to pursue another for that person's misconduct. Such a tortfeasor is entitled to indemnification from the active

tortfeasor. *Id.* Even if Shapland were somehow found to be an active tortfeasor himself under the circumstances alleged in the amended complaint, he would be entitled to contribution from Howe to the extent of Howe's relative liability. *Id.*

If it is not moot, Howe's motion to dismiss the cross-claim of the Shapland defendants should be denied.

IV. Conclusion

For the foregoing reasons, the plaintiffs' motions to strike are **DENIED**. The Shapland defendants' motion to strike is **GRANTED** in part and **DENIED** in part, as set forth above. I recommend that the motion of the Shapland defendants for summary judgment and the motion of the Nagel defendants to dismiss be **GRANTED**. I recommend that the motion to dismiss filed by the Howe defendants be **DENIED** and that, in the event that it is not moot, the motion to dismiss the cross-claim filed by Howe also be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of September, 2002.

David M. Cohen
United States Magistrate Judge

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